



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 19, 2004

Mr. E. Bruce Curry  
Office of the District Attorney  
216<sup>th</sup> Judicial District  
521 Earl Garrett Street  
Kerrville, Texas 78028

OR2004-7068

Dear Mr. Curry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207720.

The Office of the District Attorney, 216<sup>th</sup> Judicial District (the "district attorney") received a request for information pertaining to a specified individual and cause number. You state that the district attorney has provided the requestor with some of the requested information. You claim that the remaining requested information is excepted from disclosure pursuant to sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in part, that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). The submitted information constitutes information from a completed investigation made of, for, or by the district attorney that is subject to section 552.022(a)(1). Thus, the district attorney must release the submitted information,

unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Although the district attorney claims that the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that section 552.103 is a discretionary exception to disclosure under the Public Information Act (the "Act") that does not constitute "other law" for purposes of section 552.022.<sup>1</sup> Accordingly, we conclude that the district attorney may not withhold any portion of the submitted information under section 552.103 of the Government Code.

You claim that the submitted information is excepted from disclosure pursuant to section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to that information. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Although you acknowledge that the defendant in this matter was convicted and placed on felony probation, you state that section 552.108(a)(1) applies to the submitted information because of the "possibility of a probation revocation action being filed at some time in the future prior to December 17, 2007, (although there is no basis for such a motion to revoke at this time, to my knowledge)." After carefully reviewing your representations and the submitted information, we find that the district attorney has failed to adequately demonstrate that the information pertains to an ongoing criminal investigation or prosecution or that the release of the information would otherwise interfere with the detection, investigation, or prosecution of crime. Accordingly, we conclude that the district attorney may not withhold any portion of the submitted information under section 552.108(a)(1) of the Government Code.

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<sup>1</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not generally constitute "other law" for purposes of section 552.022 of the Government Code.

However, we note that the submitted information is subject to section 552.101 of the Government Code in conjunction with the common-law right to privacy.<sup>2</sup> Information is protected from disclosure by the common-law right of privacy when it (1) is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has found that the following types of information are also protected from disclosure by the common-law right to privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under section 552.101 of the Government Code in conjunction with the common-law right to privacy. *See* Open Records Decision No. 393 (1983). However, in this instance, the requestor knows the identity of the alleged sexual assault victim in this matter. Thus, we believe that withholding only the alleged victim's identifying information from the requestor in this instance would not preserve the victim's common-law privacy interests. Accordingly, we conclude that the district attorney must withhold the submitted information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy, provided that the requestor is not the authorized representative of the alleged sexual assault victim in this matter. However, if the requestor is the authorized representative of the alleged sexual assault victim in this matter, then the district attorney may not withhold any portion of the submitted information under section 552.101 in conjunction with the common-law right to privacy on the basis of any privacy interests that the alleged sexual assault victim may have in the information. *See* Gov't Code § 552.023(a) (providing that person or person's authorized representative has special right of access to information when only basis for excepting information involves protection of same individual's privacy interest); *see also* Open Records Decision No. 481 at 4 (1987). In the event that the requestor is the authorized representative of the alleged

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<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

sexual assault victim in this matter, we next address whether any portion of the submitted information must be released to the requestor. In this regard, we first note that we have marked the types of additional information contained within the submitted information that must be withheld pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We also note that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with sections 560.001, 560.002, and 560.003 of the Government Code. Section 552.101 also encompasses information that is protected from disclosure by other statutes. These sections of chapter 560 govern the public availability of fingerprint information and provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
  - (A) the individual consents to the disclosure;
  - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
  - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. Based on our review of the remaining submitted information, we have marked the fingerprint information that the district attorney must withhold pursuant to section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Further, we note that portions of the remaining submitted information may be excepted from disclosure pursuant to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

- (1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]
- (2) county jailers as defined by Section 1701.001, Occupations Code[.]
- (3) current or former employees of the Texas Department of Criminal Justice ["TDCJ"] or of the predecessor in function of the department or any division of the department[.]
- (4) commissioned security officers as defined by Section 1702.002, Occupations Code.

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)-(b). Accordingly, we conclude that if the information that we have marked under section 552.1175 pertains to an individual listed in section 552.1175(a) who elects to restrict access to his or her such information in accordance with section 552.1175(b), then the district attorney must withhold that information pursuant to section 552.1175 of the Government Code.

In addition, we note that social security numbers contained within the remaining submitted information may be excepted from disclosure pursuant to section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C.

§ 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that were obtained or are maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). The district attorney has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the district attorney, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the district attorney should ensure that they were not obtained and are not maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990.

Further, we note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the district attorney must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

Finally, we note that a small portion of the remaining submitted information is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the district attorney must withhold the submitted information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy, provided that the requestor is not the authorized representative of the alleged sexual assault victim in this matter. If the requestor is the authorized representative of the alleged sexual assault victim in this matter, then the sheriff must: 1) withhold the types of additional information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy; 2) withhold the information that we have marked pursuant to section 552.101 in conjunction with section 560.003 of the Government Code and section 552.130 of the Government Code; 3) withhold the information that we have marked under section 552.1175, if it pertains to an individual listed in section 552.1175(a) who elects to restrict access to his or her such information in accordance with section 552.1175(b); 4) withhold social security numbers that may be confidential under federal law; and 5) release

the remaining submitted information to the requestor in compliance with the applicable copyright law for the portion of the remaining submitted information that is copyrighted.<sup>3</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

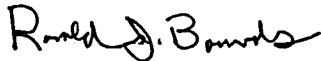
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<sup>3</sup> We note that portions of the submitted information contain confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information if the alleged sexual assault victim in this matter is the requestor's client. See Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the district attorney receives a future request for this information from an individual other than the requestor, the district attorney should again seek our decision.

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/krl

Ref: ID# 207720

Enc. Marked documents

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